PRESERVING THE PUBLIC INTEREST: A TOPICAL ANALYSIS OF CABLE/DBS CROSSOWNERSHIP IN THE RULEMAKING FOR THE DIRECT BROADCAST SATELLITE SERVICE

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In the early 1980's the direct broadcast satellite service ("DBS")[1] was envisioned both as a revolution for the nation's television screens and as a technical curiosity that would forever supplement cable television in areas where cable could not reach.[2] Today, with names such as DirecTV[3] and Dish Network[4] becoming ubiquitous, DBS's future is assured. It has made one of the most successful debuts in consumer electronic history,[5] with industry analysts touting that in the short period between the service's inauguration in 1994 to present,[6] DBS has acquired over 9 million sub-

[1] DBS is a non-broadcast video service in which satellites beam television signals back to earth using high-powered transponders (transmitters) that allow the use of small size satellite receiving antennas (dishes). *See* DANIEL L. BRENNER, MONROE E. PRICE AND MICHAEL I. MEYERSON, 2 CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 15.01 (April 1998) [hereinafter *Nonbroadcast Video*]; *c.f., Satellite Communications/ Direct Broadcast Satellites Hearing Before the Subcomm. on Telecom., Consumer Protect., and Finance,* 97th Cong. 97-81 (Testimony of Stanley S. Hubbard, President, United States Satellite Brdcstng. Co.)(Dec. 15, 1981) The current "players" in DBS include DirecTV and USSB, which are licensed at 101° West Longitude (W.L.), EchoStar (Dish Network) licensed at 119° and 61.5° W.L., Continental and Dominion Video Satellite are licensed, but have not launched their satellites at 61.5° and 166° W.L. . Tempo Satellite launched a satellite at 119° W.L. in March of 1996 and an outstanding authorization at 166° W.L. , but has yet to offer service. *See* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fourth Annual Report,* 13 FCC Rcd. 1034, paras. 54-67 (1998)[hereinafter *1997 Competition Report*].

[2] *See* Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, *Report and Order,* 90 F.C.C. 2d 676 (1982) [hereinafter *1982 DBS Order*] (stating that the DBS service "holds the unique promise of meeting the programming needs of the underserved"). The surveys and estimates in the 1980's believed that if the DBS service launched in 1986 as anticipated, that DBS would serve a limited audience with a subscribership would top out at around 5 million homes after 8 years of the service's existence. Most estimates at the time placed the total potential audience somewhere between 3 and 9 million subscribers. *See* John P. Taylor, "DBS Service Still Long Way Off Despite FCC Permits," TELEVISION/RADIO AGE, Oct. 18, 1982 at 37. Ironically, the latest FCC survey indicated that there were 7.2 million DBS subscribers at the end of 1997. *See In re* Policies and Rules for the Direct Broadcast Satellite Service, 13 FCC Rcd. 6907, n.2 (1998); *and 1997 Competition Report, supra* note 1.

Testimony before Congress in the 1980's was pessimistic about DBS. The Commission stated in the *1982 DBS Order* that DBS would remedy the lack of commercial television in rural areas. One witness before Congress disputed this assertion, testifying that DBS reception would be problematic and that it would serve a non-existent consumer demand for entertainment sources (citing that video cassettes and discs, among other media, would more easily satisfy this demand). *See Satellite Communications/Direct Broadcast Satellites Hearing Before the Subcomm. on Telecom., Consumer Protect., and Finance,* 97th Cong. 100-103 (statement of Wallace J. Jorgenson, Assoc. of Maximum Service Telecasters and the Three Television Network Affiliates Associations). He argued that DBS is not local, is subject to various technical limitations and would place control of the national television medium in the hands of the few. *See id.*; *and 1982 DBS Order* at para. 32. Other testimony supported the Commission's prediction that DBS would bring video service to the "tens of millions of homes" that would be unlikely to ever receive terrestrial video service and that DBS would inject a much needed element of competition into the MVPD market. *See Satellite Communications/ Direct Broadcast Satellites Hearing Before the Subcomm. on Telecom., Consumer Protect., and Finance,* 97th Cong. 97-81 (Testimony of Irving Goldstein, President, Satellite Television Corp.)(Dec 15, 1981)(quoting *Notice of Proposed Policy Statement and Rulemaking,* Gen. Docket No. 80-603, 86 F.C.C.2d at 728).

[3] DirecTV is an affiliate of Hughes Electronics, a division of General Motors. *See* Hughes Elec. Corp., 1996 Annual Report (1998)[hereinafter *Hughes Annual Report*].

[4] Dish Network is the trade name for EchoStar Communications, based out of Littleton, Colorado. *See* EchoStar Satellite Brdcstng. Corp. (Disclosure Inc., ed. 1998)[hereinafter *EchoStar Satellite Report*].

[5] *See Cable T.V. Competition: Testimony Before the Subcomm. on Antitrust, Business Rights and Competition of the Senate Comm. On the Judiciary* (Testimony of Leo J. Hindery, Jr., President of Tele-Communications, Inc.) 1997 WL 631202 (Oct. 8, 1997)("In the last year alone, DBS added 2.7 million new customers, an astounding annual growth rate of 85%. In fact, it has been reported that DBS had 'the most successful launch of a major product in consumer electronics history.'").

[6] DirecTV/USSB began service in 1994, EchoStar launched the DISH Network on March 4, 1996. *See Hughes*

scribers.[7]

Since 1982, the Federal Communications Commission ("FCC" or "Commission") has regulated DBS as an experimental service[8] because of problems with financing and marketing DBS as well as technical challenges.[9] The Commission decided that it would be best to let the industry decide how to use the technology.[10] This policy of regulatory flexibility and experimental status continues to this day.[11]

In February of 1998, the Commission issued a Notice of Proposed Rulemaking ("NPRM"). *In re* Policies and Rules for the Direct Broadcast Satellite Service[12] proposed to finalize the rules for DBS by moving separately established regulations in Part 100 of the Commission's rules into the regulatory scheme of the domestic satellite service ("DOMSAT") in Part 25.[13]

The *NPRM*[14] also solicited public comment on several important policy questions, specifically: (1) the existence and modification of the rules on foreign ownership of DBS, (2) the possible strengthening of the existing rules involving service to Alaska and Hawaii; and, (3) whether the Commission should promulgate new rules to address the horizontal concentration of multi-channel video programming ("MVPD"), in the form of the prohibition of cable/DBS crossownership.[15] These proposals were contested by the commentators.[16]

Addressing horizontal concentration in the *NPRM,* the Commission sought comment on whether it should continue to address competitive and public interest issues on a case-by-case basis or adopt some form of MVPD/DBS crossownership rule.[17] The FCC asserted that continuing to address competition concerns on a case-by-case basis would continue a "longstanding commitment" to DBS regulatory flexibility and would not hinder the Commission's ability to address specific cases on the facts in existence at the time.[18] However, a formal rule would provide "greater predictability and consistency" and avoid the costs to the applicant and Commission of addressing specific questions on an individual basis in licensing proceedings.[19]

This Comment first discusses the Commission's concurrent power to regulate competition in the communications industry. This Comment will then examine the predicate for the Commission's establishment of a cable/DBS crossownership prohibition. Next, this Comment analyzes the arguments against imposing a blanket ownership restriction, focusing on the concerns raised by the parties in the *NPRM.* Finally, this Comment advocates that the Commission continue to analyze DBS ownership on a case-by-case basis, but with a heightened degree of scrutiny.

Annual Report, supra note 3; *and EchoStar Satellite Report, supra* note 4.

7 *See Satellite Industry Optimistic Despite Market, Launch Failures,* COMM. DAILY, Sept. 5, 1998. (Satellite TV subscriber totals reaching 9.6 million at the end of August 1998); *See e.g. DBS,* CABLEFAX, Sept. 9, 1998. (DirecTV acquires subscriber 4 million and has acquired roughly 1 million subscribers a year; up nearly 30% from last year); *and DirecTV Activates 4 Millionth Subscriber,* BUSINESSWIRE, Sept. 17, 1998.

8 *See 1982 DBS Order, supra* note 2; *and see generally Nonbroadcast Video, supra* note 1 at §§ 15.03 & 15.06 (Rel. # 11 1997) (providing detailed account of the history, development and regulation of the DBS service). The Commission was given explicit authority to regulate DBS by section 205 of the Telecommunications Act of 1996. *See* 47 U.S.C.A. 303 (v) (West Supp. 1998).

9 *See No Big Surprise: 3rd Major Player Bails Out of DBS, Citing Immature Market,* COMM. DAILY, July 11, 1984 at 1. Two of the three major potential DBS entrants were Comsat and Western Union. *Id.*

10 *See 1982 DBS Order, supra* note 2; *see also National Assoc. of Broad. v. FCC,* 740 F.2d 1190, 1200 (D.C. Cir. 1984) (Upholding the *1982 Order* and stating that Commission has the authority to approve services on an experimental basis in an effort to gather important market data to complete a regulatory framework).

11 *In re* Policies and Rules for the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking,* 13 FCC Rcd. 6907, paras. 5-8 (1998) [hereinafter *NPRM* or *Notice of Proposed Rulemaking*].

12 13 FCC Rcd. 6907 (1998).

13 *See id.* at para. 2. (stating that the Commission has historically regulated DBS and DTH-FSS (direct-to-home fixed satellite service), which is transmitted using fixed-satellite service (FSS) frequency bands separately.) The Commissions rule for the DBS service are codified in Part 100, while FSS rules, including those applicable to DTH satellite service providers, can be found in Part 25. *See* 47 C.F.R. § 25.101 *et. seq.* (1998); *and* 47 C.F.R. 100.1 *et seq.* (1998); *see e.g. Nonbroadcast Video, supra,* note 8 at § 15.07.

14 *See NPRM, supra* note 11.

15 *See id.* at paras. 20-21, 32-36, 54-59.

16 *See generally Commenters Support Case-by-Case Review of Cable Ownership of DBS,* COMM. DAILY (April 8, 1998).

17 *See id.* at para. 59.

18 *See id.*

19 *See id.*

I. REGULATING DBS IN THE PUBLIC INTEREST

A. The FCC's Shared Authority to Regulate Competition

The FCC shares responsibility for the oversight of competition in the communications industry with the Department of Justice and the Federal Trade Commission.[20] The FCC's oversight is derived from its statutory obligation to grant licenses, to regulate, and to create policy.[21] The Commission considers the competitive effects of a grant or transfer of a license as a factor in determining whether the transaction will be in the "public interest, convenience and necessity."[22]

B. Scarcity, the Public Interest and Diversity

1. Scarcity as the Basis of Commission Regulation

The conceptual foundation for the FCC's regulation of radio frequencies can be traced to the scarcity doctrine.[23] This doctrine is founded on the numerical limit on licenses and the limited nature of the radio frequency spectrum.[24]

The Commission's regulatory power has been justified on this doctrine in several landmark cases, notably *Red Lion Broadcasting Co. v. FCC*.[25] In *Red Lion*, the Supreme Court upheld the Commission's Fairness Doctrine that mandated broadcasters air opposing viewpoints on community issues.[26] While *Red Lion* is primarily viewed as a content regulation case, it is also cited for the Court's justification of the need to limit the use of the spectrum by licensing.[27] The Court equated broadcasting with two persons speaking at the same time.[28] That is, if both spoke at once nothing would be understood by either.[29] The limited nature of the spectrum imposed a duty upon the Commission to ensure that licensees would benefit the public at large.[30] Notwithstanding the express authority to regulate particular services in the Communications Act of 1934,[31] the general duty to license in the public interest provides the Commission broad discretion to regulate the qualifications and actions of licensees.[32]

2. The Public Interest: Intertwining Competition and Diversity.

The Commission's interpretation of the public interest includes the related principles of competition and diversity.[33] Promotion of competition

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20 *See* James R. Weiss and Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Department of Justice Over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 196 (Summer 1998) [hereinafter *Two Masters*]. Weiss and Stern concentrated on the Department of Justice ("DOJ") and FCC combined jurisdictions because "virtually all telecommunications mergers" are within the jurisdiction of both the FCC and the DOJ. *Id.* Their thesis is that the Commission is subject to public scrutiny and political pressure in making competitive decisions which the DOJ, as an enforcement agency, is not. *Id.* This difference in character, with the FCC as a broad prospective policy-making body and the DOJ as a narrow retrospective enforcement body, creates inefficiencies and wildly fluctuating results under the two agencies' disparate analysis. *Id.*

21 *See* 47 U.S.C.A. §§ 301 & 308 (West Supp. 1998). *See also Two Masters, supra* note 20 at 197-198 (noting that the Commission has an express grant of power under the Clayton Antitrust Act for enforcement in the area of wire and radio communication, but that the FCC is limited to administrative antitrust proceedings. Therefore, it often chooses not to use this explicit grant of authority). The Commission cites section 310 (d) as its basis for its competitive analysis. *See* 47 U.S.C. § 310 (d) (West Supp. 1998); *and* In *re* Application of Motorola, Inc. and American Mobile Sat. Corp. for Consent to Transfer Control of Ardis Company, *Memorandum Opinion and Order*, 13 FCC Rcd. 5182 (1998) (adopting a formal competitive analysis in satellite regulation for the first time). Section 310 (d) states that no permit or license can be transferred, assigned, or disposed of by transfer of control except upon the Commission's finding that the public interest, convenience, and necessity will be served. *See* 47 U.S.C.A. § 310 (West Supp. 1998).

22 *See id.; and Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950) (upholding the denial of a grant of a broadcast license to a newspaper on finding the "intent and practice of suppressing competition"). *Id.* at 35. The court stated that Congress' creation of policy and criminal penalties against monopoly does not preclude an administrative agency charged with furthering the public interest from holding the general policy of Congress to be applicable. *Id.* at 33.

23 *See* Bethany M. Burns, Comment, *Reforming the Newspaper Industry: Achieving First Amendment Goals of Diversity Through Structural Regulation*, 5 COMMLAW CONSPECTUS 61, 69 (Winter 1997) (proposing that media concentration should be the touchstone for preserving the First Amendment through regulation of the broadcast and print media) [hereafter *Achieving First Amendment Goals*].

24 *See id.*

25 *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

26 *See id.* at 373-75.

27 *See id.* at 375-76 & 396-97.

28 *See id.* at 388-89.

29 *See id.* at 387-88.

30 *See* 395 U.S. at 389-90.

31 Communications Act of 1934, c. 652, 48 Stat. 1064 (1934) (codified, as amended, at 47 U.S.C. § 151, *et seq.*).

32 *See id.* at 376-77.

33 *See* Benjamin A. Compaine, *The Impact of Ownership on Content: Does it Matter?*, 13 CARDOZO ARTS & ENT. L.J. 755, 761 (1995) [hereinafter *Impact of Ownership on Content*] (positing

will result in the diversity of content.[34] The Commission attempts to further encourage diversity by redefining licensing standards[35] or through promoting competition by limiting the number or type of licenses that may be held by an entity.[36]

In *National Citizens Committee v. FCC*,[37] the Supreme Court rejected the argument that it was impermissible for the Commission to use its licensing authority to promote diversity in the communications industry because, "[t]his argument undersells the Commission's power to regulate broadcasting in the 'public interest.'"[38] The Court asserted that the Commission had the statutory authority to make rules based on a policy of promoting diversity of ownership.[39]

C. The Commission's Available Choices of Protecting the Public Interest in DBS Ownership

The Commission has three options in formulating the final DBS ownership rules to further the public interest in diversity of ownership. First, it may promulgate a blanket rule.[40] Second, it may continue an *ad hoc* approach to determining whether the granting of a DBS license serves the public interest.[41] Third, the Commission can adopt a formal antitrust/competition analysis.[42]

II. A BLANKET DBS/CABLE OWNERSHIP PROHIBITION

Blanket ownership restrictions have long been a regulatory tool for the Commission.[43] The Commission will use a blanket prohibition whenever it believes that the public interest will be best served by a "diversification of control of the media of mass communications."[44] Examples include: (1) the Commission's 1975 restrictions on newspaper ownership of in-market broadcast properties;[45] and (2) the prohibition of cable operator ownership of Local Multipoint Distribution Service

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that the Commission's policies designed to increase viewpoint diversity through market structure regulation will continue to be ineffective).

34 *See id.*

35 For a discussion of the Commission's efforts to increase license ownership by the implementation of racially preferential licensing standards, *see* Mary Tabor, *Encouraging "Those Who Would Speak Out with Fresh Voice" Through the Federal Communications Commission's Minority Ownership Policies*, 76 IOWA L. REV. 609 (March 1991) (arguing that the Commission's attempts to increase minority participation have failed).

36 *See Impact of Ownership on Content, supra* note 33 at 762.

37 *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

38 *See id.* The Supreme Court has been described as encouraging the Commission to exercise a Congressionally mandated goal of diversity. *See Achieving First Amendment Goals, supra* note 23 at 69. In turn the Commission is said to have been "very clear" about the great lengths it will go to accomplish the maximum diversity of ownership that the technology will permit. *See Impact of Ownership, supra* note 33 at 761.

39 *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 794. The Court noted that it had sustained the Commission's multiple ownership rules in *U. S. v. Storer Broad.* , 351 U.S. 192, 203 (1956); *and National Broad. Co. v. U.S.*, 319 U.S. 190 (1943).

40 *See NPRM, supra* note 11 at para. 58 & 61.

41 *See id.*

42 *See Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992), 57 FR 41, 552 (Sept. 10, 1992), 1992 FTC LEXIS 176 (1992) [hereinafter *1992 Merger Guidelines*]. The Commission has hinted that it may take this approach. *See NPRM, supra* note 11 at paras. 59-61.

43 The concerns about the concentration of electronic media ownership are far from new. In 1924, President Calvin Coolidge warned that concentration of radio in the hands of the few was especially insidious because of the limited and exclusive right of broadcasters to use the radio spectrum. *See* Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401, 405 (Winter 1989) [hereinafter *First Amendment Invalidity*]. Since the 1940's, the FCC has promulgated rules limiting the number of broadcast stations an entity could own. *See FCC v. National Citizens Comm. for Broad* , 436 U.S. 775 (1978). The case presents a concise summary of the ownership restrictions the Commission placed on radio. The Supreme Court cites Multiple Ownership of Standard Broadcast Station, 8 Fed. Reg. 16065 (1943); *and* Rules and Regulations Governing Television Broadcast Groups, 6 Fed. Reg. 2284, 2284-2285 (1943); The Court traces the early ownership restrictions from the early days of AM radio, to the regulations prohibiting the ownership of more than one broadcast network, to the newspaper/broadcasting cross-ownership prohibitions. *Id.* at 780-782 & 781, nn. 1-3. *FCC v. National Citizens Comm. for Broad.* upheld the Commission's newspaper/broadcast crossownership restrictions, which are still in effect. *See* 436 U.S. 775 (1978); *and* 47 C.F.R. § 73.3555 (d) (1998).

44 *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 781. The Commission has historically balanced this concern for diversity of control as "a factor of primary significance" against the Commission's sometimes-conflicting goal of ensuring "the best practicable service to the public." *Id.* at 781-82. Because of this, a waiver provision was included in the regulation, which often allowed newspaper owners to hold licenses for stations in their community of license if they demonstrated that they were the only party that could provide the best service. *Id.* at 782-783; *and see* 47 C.F.R. § 73.3555, n. 4 (1998).

45 *See In re* Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 47 F.C.C.2d 97 (1974); *and FCC v. National Citizens*, 436 U.S. at 783-789.

licenses ("LMDS").[46]

A. The Newspaper/Broadcast Crossownership Restrictions

The prohibition on newspaper/broadcast crossownership remains in effect.[47] The rule prohibits newspaper owners from acquiring a broadcast station in the same market area.[48] Broadcast owners seeking to buy a newspaper in their market are required to divest their broadcast holdings within a one year period.[49] The Commission reasoned the crossownership prohibitions were consistent with the spirit of the First Amendment by preserving the public interest in independent information sources because newspapers and television were consumers' primary source of news. The mandatory divestment provisions that accompanied the ownership prohibition addressed antitrust concerns.[50]

The Supreme Court upheld the newspaper/broadcast ownership prohibition in *FCC v. National Citizens Committee for Broadcasting*.[51] The Court concluded that antitrust considerations alone would prevent the public interest from being met.[52] For example, in any given area, the acquisition of a broadcast station by a newspaper publisher could create a mass media monopoly.[53] The Court rejected arguments that the ownership restrictions infringed on free speech.[54]

B. The LMDS/Cable Crossownership Restrictions.

Recently, the Commission enacted a crossownership prohibition in the Local Multi-point Distribution Service.[55] The FCC believed that against the background of the *Primestar* cases,[56] cable operator entry into LMDS would lead to the acquisition of licenses for the purpose of preventing market entry by others.[57]

Mindful of that possibility, the Commission prohibited local exchange carriers or incumbent cable companies from acquiring a LMDS license in their service or cable franchise areas or in areas that significantly overlap their franchise area.[58] The rule contained a waiver provision as well as a "sunset" provision.[59]

These restrictions were upheld in *Melcher v. FCC*.[60] Melcher and others were LMDS license applicants who challenged the FCC ownership restrictions[61] because they believed a cable ownership in LMDS would result in increased, rather than decreased, competition for cable.[62]

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46 *See In Re* Rulemaking to Amend Parts 1,2,21, and 25 of the Commission's Rule to Redesignate the 27.5-29.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order*, 12 FCC Rcd. 12545 (1997)[hereinafter *LMDS Order*]. LMDS can provide a broad range of wireless services. *See id.* at paras. 205 & 207. It can provide one way and two way data and voice communications. *See id.* LMDS can also be used to supply multi-channel video service to subscribers. *See id.* at para. 213. Unlike cable, LMDS can carry video on a common carrier basis as an open video system. *See id.* at para. 217.

47 *See First Amendment Invalidity, supra* note 43 at 416-417; *and* 47 C.F.R. § 73.3555 (c) (1998).

48 *See* 47 C.F.R. § 73.3555 (1998).

49 *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 785, n. 8; *and see* 47 C.F.R § 73.3555 (1998).

50 *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 783 & 785. The Commission established these policies despite the contradictory, inconclusive testimony and the lack of evidence of specific competitive abuses. *See id.* at 786.

51 *See id.*

52 *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 796.

53 *See id.* (quoting dicta in *United States v. Radio Corp. of Am.*, 358 U.S. 334, 351-352 (1959)).

54 *See id.* at 799-802. The First Amendment arguments against blanket crossownership bans are discussed below in section III (A).

55 *See LMDS Order, supra* note 46. The MMDS (wireless cable) service has a statutory provision that is a "blanket" cable/local exchange carrier cross-ownership provision, put in place by the Telecommunications Act of 1996. The *LDMS Order* was affirmed by *Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998). LMDS is a wireless service that can provide one or two way fixed video, voice, and data services. LMDS licenses are versatile and can be used to provide service in the local MVPD market, the local telephone market, a broadband data market, or a combination of these services. *Id.* at para. 170.

56 *See* discussion *infra.* Part III.D.2.a.

57 *See id.* at 169. The Commission licenses LMDS in 493 geographical service areas defined as BTAs. *See LMDS Order, supra* note 46 at paras. 126 & 135.

58 *See* 47 C.F.R. § 101.1003(a) (1998).

59 *See* 47 C.F.R § 101.1003 (a)(1) (1998). The provision automatically expires ("sunsets") three years after June 30, 1997 unless it is extended by the Commission. *Id.*

60 *See Melcher v. FCC*, 134 F.3d 1143, 1149 (D.C. Cir. 1998).

61 *See id.*

62 *See id.* Melcher argued that there was a lack of evidence that an entity would use its licenses primarily to block entry into an MVPD market. *See id.*

III. CHALLENGING A BLANKET DBS/CABLE CROSSOWNERSHIP PROHIBITION

A. The First Amendment

1. *The First Amendment as a Barrier to Spectrum Regulation*

A commentator to the *NPRM* asserted that enacting a prospective blanket crossownership ban offends the First Amendment.[63] In similar cases presenting similar arguments, the Supreme Court has resoundly rejected these contentions.[64]

In *Red Lion Broadcasting v. FCC*,[65] the Court concluded broadcasters cannot receive absolute First Amendment protection because the limited spectrum cannot accommodate all individuals who wish to broadcast over it.[66] Thus, the Court reasoned it would be impractical to find an unabridgeable First Amendment right to broadcast.[67] The Court asserted that no one has a First Amendment right to monopolize the radio frequencies.[68] Therefore, a denial of a license on public interest concerns cannot be equated with the denial of free speech.[69]

2. *The First Amendment as Barrier to Competition Regulation*

Just as the denial of a license in the public interest does not offend the First Amendment, it is not a barrier to licensing and regulating broadcasting, and it does not provide a sanctuary for anticompetitive behavior. In *Citizen Publishing Co. v. U.S.*[70] and *Associated Press v. U.S.*,[71] the Supreme Court clarified that the First Amendment is a powerful reason for antitrust enforcement.[72] The Court asserted that the First Amendment rests on the assumption that diverse viewpoints are essential to the public welfare because the freedom to publish is guaranteed.[73] Nevertheless, the freedom to combine and keep others from publishing is not guaranteed.[74]

Recently, in *Sunbelt Television v. Jones Intercable*,[75] a district court noted that the Supreme Court consistently finds media antitrust defendants not immune from suit if their activities are guided by anti-competitive motives.[76] The court, citing *Lorain Journal v. U.S.*,[77] determined the First Amendment is not a cloak for activities that destroy the competitive marketplace.[78] The court reasoned the goal of protecting the competitive marketplace is a factor that should be considered in the First Amendment jurisprudence.[79] Thus, the First Amendment protects competition that would result from free speech. From this perspective, the First Amendment is not a barrier to establishing a crossownership prohibition in DBS.

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63 *See* Comments of Time Warner Cable to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 7-8 (April 6, 1998); *and* Reply Comments of Time Warner Cable to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 9-10; *but see* Reply Comments of EchoStar Communications Corp. to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 7-8 (April 22, 1998).

64 *See Red Lion Broad. v. FCC*, 395 U.S. 367 (1969); *and National Broad. Co. v FCC*, 319 U.S. 190 (1943).

65 *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (upholding the personal attack provisions that required a station who broadcast a personal attack to furnish the person attacked with a tape, transcript or summary of the broadcast and time for a response).

66 *See id.* at 388-89.

67 *See id.* at 389. It stated that "it would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum." *See id.*

68 *See id.*

69 *See id.* (quoting *National Broad. Co. v. FCC*, 319 U.S. 190).

70 *See Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (affirming the judgment that a joint operating agreement between two daily newspapers violates the Sherman Antitrust Act).

71 *Associated Press v. United States*, 326 U.S. 1 (1945) (upholding summary judgment in favor of the Government enjoining the Associated Press prevention of dissemination of news by members to non-members).

72 *See Citizen Publishing Co. v. United States*, 394 U.S. at 139-40 (quoting *Associated Press v. United States*, 326 U.S. at 20).

73 *See id.*

74 *See id.*

75 *See Sunbelt Television v. Jones Intercable*, 795 F. Supp. 333 (C.D. Ca. 1992) (denying motion to dismiss in a civil monopoly action by a TV station against a cable system which refused to carry the signal).

76 *See id.* at 335.

77 *See id.* at 336, (quoting *Lorain Journal v. U.S.*, 342 U.S. 143, 155 (1951) (holding that the First Amendment does not protect anti-competitive advertising practices by newspaper)).

78 *See Sunbelt TV v. Jones Intercable*, 795 F. Supp. at 336 (finding that antitrust laws only incidentally restrict speech).

79 *See id.* The court goes on to state that "the Sherman Act interferes only with those decision-makers who themselves seek to muzzle the marketplace of ideas. . . the First Amendment will not safeguard, nor should it, anti-competitive program decisions." *Id.*

3. Turner Broadcasting v. FCC: *Some Regulations Offend the First Amendment*

Commentator Time Warner Cable cites *Turner Broadcasting System v. FCC*[80] for the proposition that any regulation promulgated by the Commission implicating the First Amendment would not pass intermediate scrutiny.[81] The *Turner* court invalidated regulations mandating cable carriage of certain television stations.[82] It found that there was not enough evidence on the record to indicate that broadcast stations were in financial trouble or in need of protection or that a blanket rule was the least restrictive means available.[83]

Time Warner correctly stated that the *United States v. O'Brien*[84] First Amendment test would sustain a content-restrictive regulation, but only if it furthered an important governmental interest and only incidentally infringed the First Amendment.[85] However, the application of *Turner* to DBS is a misreading of the Court's holding because the proper standard for review of DBS ownership regulation is to examine whether the ownership qualifications would assure that the DBS licenses granted are in the public interest.

This public interest takes DBS beyond the parameters of *O'Brien*[86] and *Turner Broadcasting System* and places it under the deferential review accorded in *FCC v. National Citizens Committee for Broadcasting*.[87] The *Turner Broadcasting System* court refused to apply the *National Citizens Committee* line of reasoning because cable does not fall into the unique physical limitations of broadcasting supported by the "scarcity" rationale applied in *National Citizens Committee*.[88] As the court stated in *Ameritech Corp. v. FCC*,[89] a scarcity rationale may or may not be necessary to support a crossownership rule, however, it is a necessary prerequisite to application of rational basis scrutiny under *National Citizens Committee*.[90]

In further support of its position, Time Warner offers *Daniels Cablevision v. U.S.*[91] The *Daniels* court invalidated a provision of the 1992 Cable Act directing the Commission to set limits on the number of cable subscribers a cable operator can reach through cable systems it owns or has an interest.[92]

The *Daniels* court was troubled by the statutory restraints on subscribership because the limits precluded a cable system from attempting to serve more subscribers in its service area.[93] The rules set a cap that once reached, would require the cable system to deny service to willing subscribers.[94] In declaring the cap unconstitutional, which would have profoundly affected cable system revenues, the court asserted that "[t]he First Amendment protects the right of every citizen to reach the minds of any willing listeners. . ."[95] Unlike in *Daniels*, the denial of a DBS license to a cable operator would not leave the operator "with absolutely no intra-medium means of speaking to the remainder of its potential audience."[96] The denial does not eliminate the cable system from attracting more potential subscribers in the cable service area.[97]

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80 *See* Comments of Time Warner Cable to *In* re Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 7. [hereinafter *Comments of Time Warner Cable*]; *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) (challenging the "must carry" provisions of the 1992 Cable TV Act).

81 *See* Comments of Time Warner Cable, *supra* note 80 at 7 (stating that the Supreme Court has "unequivocally held" that cable operators engage in speech and are entitled to the full protection of the First Amendment and that a complete cable/DBS cross-ownership ban could not withstand any legal standard of scrutiny under the First Amendment).

82 *See Turner Broad. Sys. v. FCC*, 512 U.S. 667-68.

83 *See id.*

84 *See* Comments of Time Warner, *supra* note 80 at 7. (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (stating that a regulation that incidentally infringes upon the First Amendment will be upheld as along as it is the least burdensome alternative)).

85 *See Turner Broad. Sys.* at 662 (quoting *U.S. v. O'Brien*, 391 U.S. 367, 377).

86 *See U.S. v. O'Brien*, 391 U.S. 367.

87 *See Ameritech Corp. v U.S.*, 867 F. Supp. 721, 729-731 (N.D. Ill. 1994).

88 *See id.*

89 *See id.*

90 *See id.* at 730. The court in *Ameritech* makes it clear that the "economic characteristics of the broadcast market" is not the underlying basis for the broadcast regulation cases, but rather the "special physical characteristics of the medium." *Id.* at 730-731. Stating that the "Supreme Court made clear" in *Turner Broadcasting* that "such a 'market dysfunction' rationale was not at the root of the broadcast regulation cases. . .." *Id.* at 731 (citing *Turner Brdcstng. Sys. v. FCC*, 512 U.S. 682).

91 *See Daniels Cablevision v. U.S.*, 835 F. Supp. 1 (D.D.C. 1993) (holding in part that FCC-established subscriber limits violate the First Amendment).

92 *See id.* at 10; *See* Cable Act of 1992 § 613 (f), Pub. L. No. 102-385 (codified at 47 U.S.C. § 533 (1998).

93 *See Daniels Cablevision v. U.S.*, 835 F. Supp. at 10.

94 *See id.*

95 *See id.*

96 *See Daniels Cablevision v. U.S.*, 835 F. Supp. at 10.

97 *See id.* A cable system could lower its rates, improve its service, add more attractive programming or engage in a more effective advertising campaign. *Id.*

B. Alleging DBS Lacks the Necessary Scarcity

The scarcity rationale articulated in *Red Lion v. FCC*[98] is based on the premise that radio broadcasting was more susceptible to reality of interference created by multiple speakers.[99] For example, until the establishment of the Federal Radio Commission in 1927,[100] each operator chose the frequency on which he would broadcast.[101] The result was chaos.[102] The Radio Act of 1927 and the Communications Act of 1934 restored order to the airwaves.[103] Regulations that limit the use of radio frequencies are necessary to avoid a return to airwave anarchy.[104] Therefore, the concept of scarcity is not likely to disappear from radio regulation.

However, because broadcast regulation is premised on the scarcity concept, if scarcity does not exist in a particular situation the regulation will be invalidated.[105] A DBS ownership restriction could be attacked by refuting the existence of scarcity.

1. The Presence of Other Competitive Media Means DBS is Not Scarce

Critics of DBS ownership restrictions assert that because the Commission has broadly defined the relevant competitive marketplace for DBS as the multi-channel video programming distribution market scarcity is not present in DBS.[106] This definition assumes that the American consumer could ideally choose to watch MTV, CNN or ESPN by subscribing to one of a number of choices outside cable and DBS.[107] However, alternative choices to DBS are irrelevant to the concept of licensing.[108] Further, while DBS is a MVPD system, it is a broadcast medium with regulatory and performance characteristics different than those of cable.

The Commission's licensing process is concerned more with the method of information delivery to the home rather than the media's content.[109] As such, the Commission's duty to protect the pubic interest makes ownership concentration of licenses an overriding concern.[110]

Like radio and television broadcasting, DBS has two constant scarcities: spectrum[111] and satellite orbital positions.[112] One commentator noted that the Commission's *DISCO II* decision[113] allows entities to avail themselves of another country's licensing procedures via the requisite reciprocal agree-

98 *See Red Lion Broad. v. FCC*, 395 U.S. at 367-76.

99 *See id.*

100 *See id.* at 375-376; *and* Michael F. Finn, *The Public Interest and Bell Entry into Long-Distance Under Section 271 of the Communications Act*, 5 COMMLAW CONSPECTUS 193, 207 (Summer 1997) [hereinafter *The Public Interest*].

101 *See Red Lion Broad. v. FCC*, 395 U.S. at 375.

102 *See id.*

103 *See The Public Interest, supra* note 100 at 207. The *Red Lion* Court, in footnote five quotes one of the Radio Act's sponsors who stated that the right of all Americans to enjoy radio communication can only be preserved only by the repudiation of the idea that anyone who wishes to transmit may transmit and replacing it with the assertion that the right of the public to service is superior to the right to any individual. *See Red Lion Broad. Co. v. FCC*, 395 U.S. at 376, n 5.

104 *See id.* at 375-76.

105 *See* Turner Broad. Sys. v. FCC, 512 U.S. 682 (1994).

106 *See* 1997 Video Competition Report, *supra* note 1 at paras. 71-89 & 97-102.

107 *See id.* The consumer's choices outside DBS or cable would include a satellite master antenna television system ("SMATV"), a wireless cable system like "LMDS", as well as "cable" delivered by one's telephone company or over the Internet. *See id.*

108 This argument is also belied by participant behavior in the last auction period and in the Primestar licensing proceedings. If the availability of spectrum and orbital positions were not scarce, then the value of a license would arguably be less than prices that have been paid at auction. See NAB Attack on Satellite TV Won't Hurt DBS Growth, Investors Say, Satellite Week, July 29, 1996 (stating that a industry member comments MCI/News Corp. will need 3 million viewers to break even because of the $682 million it paid for DBS license).

109 This goes back to the Commissions basic premise that the radio spectrum is a scarce resource. Cable TV and telephone regulations are premised on the concept that they are natural monopolies along the lines of a public utility. See generally Nonbroadcast Video, *supra* note 1 at §§ 3.01-3.06; also Michael K. Kellogg, et al., Federal Telecommunications Law 1-4 (1992); and *see* Thomas G. Krattenmaker, Telecommunications Law and Policy 343-46 (2d ed. 1998). The Commission only licenses the use of the radio spectrum.

110 Concentration of control of DBS is not a new concern, even before the service was authorized, commentators expressed trepidation in placing the control of national video in the hands of the few. *See* Satellite Communications/ Direct Broadcast Satellites Hearing Before the Subcomm. on Telecom., Consumer Protect., and Finance, 97th Cong. 97-81 (Testimony of Wallace J. Jorgenson, Representing MST and the Three Television Network Affiliates Assoc.) (Dec. 15, 1981).

111 *See* Red Lion Broad. v. FCC, 395 U.S. at 400; and NPRM, supra note 11 at para. 6.

112 The DBS service has three full-continental United States "slots" internationally allocated with several others than can only "see" part of the country (the satellite would be below the horizon of the earth for the rest of the country). *See Nonbroadcast Video, supra* note 1 at § 15.01; *and NPRM, supra* note 11 at para. 6.

113 *See* Comments of Primestar to *In re* Policies and Rules

ments[114] and broadcast to the American consumer. This effectively increases the spectrum and orbital positions available to the domestic market.[115] While the effect is the creation of more choices in the satellite MVPD market, it does not enlarge the DBS resources available for licensing by the Commission.[116]

2. *Refuting Scarcity with the Advancement of Technology*

A second argument against the presence of scarcity in DBS is premised on the advancement of technology creating additional MVPD media.[117] In *Turner Broadcasting,* the Court applied this argument to invalidate a cable television "must carry" regulation.[118] But the court spoke only to cable content regulation and the potential for technology to expand the capacity of cable systems to carry more "speakers."[119]

DBS capacity has increased dramatically since its 1982 inception when the average DBS satellite only had the capacity to broadcast six channels.[120] Current DBS satellites broadcast at least six channels on each transponder with the current maximum capacity of a satellite equaling 32 transponders.[121] Such technological advances make DBS more attractive to consumers because the program capacity is increased.[122] However, this ignores the fundamental problem: the finite amount of licenses and radio spectrum.[123]

C. A Blanket DBS Crossownership Prohibition is an Arbitrary and Capricious Change in the Policy Tide

When the Commission acts inconsistently with its past action, it is subject to the possibility of a legal challenge and judicial review.[124] As the court held in *Greater Boston Television Corporation v.*

for the Direct Broadcast Satellite Service, FCC 98-26 at 11 (April 6, 1998) [hereinafter *Comments of Primestar*]; *and In re* Amendment to the Commission's Regulatory Policies to Allow Non-U.S. Licensed Spacecraft to Provide Domestic and International Services in the United States, *Report and Order,* (1997) [hereinafter *DISCO II*]; *see also NPRM, supra* note 11 at para. 12 (summarizing the foreign satellite policy). *See In re* Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, *Report and Order,* 11 FCC Rcd. 2429 (1996).

114 *See* Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 28, 1996; *and* Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States and the United Mexican States, *Public Notice,* DA 96-1880 (Nov. 13, 1996) (example agreement).

115 *See In re* Televisa International, LLC, *Order and Authorization,* 13 FCC Rcd. 10074 (1997) (authorizing the operation of 1 million earth stations to receive video programming from Mexico's Solaridad II satellite).

116 The utilization of foreign orbital positions is dependent upon a favorable agreement with neighboring nations and involves foreign policy decisions and subjects the owner of a foreign-licensed satellite to the regulatory system of a foreign administration. *See generally, DISCO II, supra* note 113.

117 *See* Comments of Primestar, *supra* note 113 at 12-13; *and* Comments of News Corp. to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 6-8 (April 6, 1998) [hereinafter *Comments of News Corp.*].

118 *See Turner Broad. Co. v. FCC,* 512 U.S. at 638-39. The court stated that "[t]he broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel." *Id.*

119 *See id.*

120 *See* Comments of Dominion Video Satellite, Inc. to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC No. 98-26 at 2-3 (April 6, 1998) [hereinafter *Comments of Dominion Video*]

121 *See id.* at 2-3; *and see generally 1996 Hughes Annual Report* (stating that Hughes next generation satellite will double the power of the most sophisticated satellite currently in orbit). The "magic" capacity increase was done through digital compression and multiplexing (combining) of data streams onto each transponder, with corresponding perfection of satellite construction techniques and larger satellite launch vehicles. *See* Dawn Stover, *Little Dish TV,* POPULAR SCIENCE, Jan. 1, 1995 at 60 (discussing, in part, compression technology); *see also Nonbroadcast Video, supra* note 1 at § 15.08.

122 *See generally 1996 Hughes Annual Report.* Like in *Turner,* the increased program capacity has enabled DBS to carry more "speakers." *See id.; and also Turner Broad. Sys. v. FCC,* 512 U.S. at 638-39.

123 This argument also ignores the fact that it takes an average of 3 years to get a satellite built and launched from the day it is ordered, the extraordinary initial capital costs of building and launching the spacecraft, and the length of time the average DBS satellite is expected to remain in service (about 10 years). *See* Comments of Dominion Video Satellite, *supra* note 120 at 5 (average lifespan and cost of a satellite); *see also EchoStar 1997 Annual Report* at para. 9 (stating that the construction and launch of the EchoStar IV satellite $ 68 million U.S. dollars). EchoStar estimates the lifespan of its four satellites at 12 years. *See EchoStar Comm. Corp.,* 10-Q Report at 8 (Aug. 8, 1998). This extended time frame, even assuming that expanded capacity would remedy the scarcity of spectrum, that any such remedy from increased satellite capacity would arrive 10 years too late.

124 *See* WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 416-18 (1997).

FCC,[125] judicial vigilance is called when the Commission's policies are in flux because the Commission's view of the public interest may change with or without a change in circumstances.[126]

This argument is countered by the Commission's need and responsibility to re-evaluate its regulatory standards on a regular basis.[127] The Commission has the right to modify and overrule long-standing precedents, though "such abrupt shifts constitute 'danger signals' that the Commission may be acting inconsistently with its mandate."[128] When enacting a DBS/cable crossownership restriction, the Commission is required to provide a reasoned analysis that must indicate that prior policies and standards are being deliberately changed and not casually ignored.[129]

Several commentators remark that the Commission would completely changing its policy by enacting a blanket DBS/cable crossownership prohibition.[130] The argument is flawed on two regards.

The argument ignores the precedent of the past 64 years of broadcast regulation and jurisprudence.[131] First, deregulation and regulatory flexibility is still a relatively new concept in communications regulation, having taken root in the 1970's and advocated in the Telecommunications Act of 1996.[132] Second, the Commission has long taken antitrust concerns into its determination of the public interest.[133]

While the Commission considered and rejected crossownership restrictions on DBS in the past,[134] it reserved the authority to impose them if a need arose in the future.[135] Several commentators argued the *1982 DBS Order* established Commission precedent that ownership restrictions on the DBS service were unnecessary.[136]

1. *The 1982 DBS Order: Precedent for the Rejection of a Crossownership Prohibition*

The situation faced by the Commission in the *1982 DBS Order* was unique. DBS had not been deployed so no evidence existed as to the viability of the service with consumers or financiers.[137] The Commission assumed that many alternative video sources would be available by the time DBS systems became operational,[138] and ownership restrictions would limit the availability of service

125 *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

126 *See id.* at 852.

127 *See Office of Comm. of the United Church of Christ v. FCC*, 707 F.2d 1413, 1424-25 (D.C. Cir. 1983) (upholding the FCC's requirement to continue to impose "community issue" programming on commercial radio, but eliminating the formal ascertainment requirements). Since the Telecommunications Act of 1996, the Commission is required to undertake a biennial review of its regulations. *See* 47 U.S.C. § 161 (West 1998); *and* Commissioner Harold W. Furtchgott-Roth, Report on Implementation of Section 11 by the Federal Communications Commission (Dec. 21, 1998) (reporting mixed results from the 1998 review, which was the first year of implementation).

128 *See id.*

129 *See id.* at 1425. The court also indicates that the "reasoned analysis and factual bases" will be scrutinized closely for assure that there is a rational and considered discussion that is supported by the facts and law. *Id.* at 1426.

130 *See* Comments of the News Corp., *supra* note 117 at 3-5.; Comments of Primestar, *supra* note 117 at 13-17; Comments of Tempo Satellite to the *Notice of Proposed Rulemaking* in FCC 98-26 at 7 (April 12, 1998) [hereinafter *Comments of Tempo*]; *Comments of Time Warner Cable, supra* note 60 at 2-7.

131 *See* notes and text, *supra*.

132 *See* LEON T. KNAUER, RONALD K. MACHTLEY AND THOMAS M. LYNCH, TELECOMMUNICATIONS ACT HANDBOOK at 61 (1996) (chronicling the rise of broadcast deregulation).

133 *See Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950). "The fact that a policy against monopoly has been made the subject of criminal sanction by Congress does not preclude an administrative agency charged with the public interest from holding the general policy of Congress to be applicable top questions arising in the proper discharge of its duties. . . Monopoly in the mass communication of news and advertising is contrary to the public interest, even if not in terms proscribed by antitrust laws." *Id.* at 33; *see also Serving Two Masters, supra* note 19 at 207 (citing *U.S. v. FCC*, 652 F.2d 72, 87 (D.C. Cir. 1980) for the proposition that the FCC is required to take antitrust considerations into its public interest analysis).

134 *See In re* Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd. 9712 (1995) [hereinafter *1995 DBS Auction Order*] (deciding to adopt a single one-time rule prohibiting a person with an attributable interest in channels at a full-CONUS orbital location from acquiring channels in an auction).

135 *See id.* at para. 30. ("[b]alancing the competitive concerns against the public interest concerns – such as the expedition of service and allowing the market to maximize efficient use of public resources – We [the Commission] believe that the single, temporary structural rule. . . should be adequate."); *and 1982 DBS Order, supra* note 2 at para. 98 (stating that if the Commission's experience with the early DBS systems indicates that excessive concentration of control limits access to information it will retain the option of imposing ownership restrictions).

136 See Comments of Time Warner, *supra* note 60 at 3-4; *and In re* Policies and Rules for the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, 13 FCC Rcd. 6097, Comments of the National Cable Television Association to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 5-7 (April 6, 1998) [hereinafter *Comments of NCTA*].

137 *See* note 2, *supra*.

138 *See 1982 DBS Order, supra* note 2 at para. 95. While technically true, LMDS and SMATV has a minor percentage

provided by the most experienced and capable suppliers.[139] The Commission believed that an ownership restriction would prevent DBS operators from assembling attractive program packages.[140] The Commission also assumed that the penetration and ownership concentrations in the cable industry would remain at 1982 levels because it stated that it would address concerns about concentration of control on a locality by locality basis.[141]

The marketplace assumptions that underlie the *1982 DBS Order* do not reflect the present day competitive reality. First, heavy national concentration of cable system ownership implicates control issues that span large aggregate blocks of jurisdictions, not just limited individual localities.[142] Second, the 1992 Cable Act has removed the television program access advantages that cable ownership was purported to bring to DBS.[143] As a result of the Cable Act, program suppliers are forbidden to discriminate against DBS, so cable operators and DBS systems have equal footing to program acquisition. Third, the Commission did not exclude enacting ownership restrictions: the *1982 DBS Order* simply stated that it was not going to institute an ownership control provision absent a useful purpose.[144]

2. The 1995 DBS Auction Order

Commentators use the Commission's decision in the *1995 DBS Auction Order*[145] not to impose a restriction on cable systems in a forthcoming DBS auction as a rejection of all ownership restrictions.[146] In the *Order*, the Commission stated that the presence of existing non-cable affiliated DBS providers would severely constrain the strategic activities of a DBS-MVPD combination because consumers would have at least two other competitive sources for DBS service.[147] However, the Commission also asserted that the non-aggregation rule it was adopting in the *Auction Order* eliminated the need for a separate restriction on non-DBS multi-channel video program distributors.[148]

D. The Commission has Evidence of a Need for an Ownership Restriction

Some commentators argue that there is not enough evidence to support a crossownership restriction.[149] The opposite is true. First, the video program distribution markets will continue to be highly concentrated. Second, cable system operators have a history of unfair practices. Third, pre-

of the MVPD marketplace today, and while DBS is growing, cable still dominates the field. This may change in the long run, but the anti-competitive concerns exist now.

139 *See 1982 DBS Order, supra* note 2 at para. 97.

140 *See id.* at para. 97. The questions of program access have been eliminated, at least in the eyes of the law, by the provisions of the Telecommunications Act of 1996, the 1992 Cable Act. However, program access violations still occur. *See generally In re* Echostar Comm. Corp v. Fox/Liberty Networks, *Program Access Complaint*, 13 FCC Rcd. 7394 (1998).

141 *See 1982 DBS Order, supra* note 2 at para. 98.

142 *See 1997 Competition Report, supra* note 1 at paras. 149-56.

143 *See generally In re* Implementation of the Cable Television Consumer Protect. and Competition Act of 1992, 10 FCC Rcd. 3105 (1994).

144 *See id.*

145 *In re* Revisions of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd. 9712 (1995).

146 *See id.* at para. 73.

147 *See id.* The Commission also states that it has recognized that cable-affiliated MVPD's bring "certain positive attributes as DBS permittees." *Id.*

148 *See id.* at para. 72. The Commission also addresses the fact that it may have figuratively already left door open for cable in *Tempo II*. It states that "it is not necessary to reverse Tempo II and exclude a cable-affiliated operator from the opportunity to control or use DBS spectrum. . ." *See id.* at para. 74. It notes Tempo/TCI's "substantial" investment in its DBS system and makes a deference to that decision at least partially attributable to reliance. *Id.* The Commission then concludes that it will still have the power to grant, deny or condition any proposed transactions in the event a non-DBS MVPD attempts to acquire one of the existing and operational DBS systems at the other two full-CONUS positions at 110° and 119° W.L. *Id.* at para. 76. The Commission seems to have ignored the fact that in *Tempo II* that it severely conditioned Tempo's authorization. *See In re* Application of Tempo Satellite, Inc. for the Construction Permit for New Direct Broadcast Satellite System, *Memorandum Opinion and Order*, 7 FCC Rcd. 2728 at para. 12 (1992). It also ignores the fact that it stated that Tempo's participation in the DBS industry could accelerate the initiation of DBS service. *Id.* at para. 10. Allowing the unconditional entry of a non-MVPD operator in the context of the 1995 auction proceedings does not logically flow from the heavily conditioned authorization granted Tempo in the name of expediency. In *Tempo II*, the public interest in "the best service" was clearly equal to encouraging the initiation of service where there was none before. In 1995, with four, now three, operators broadcasting already, the same cannot be said to be true. *See supra* note 1.

149 *See* Comments of Primestar, *supra* note 117 at 6-10; *and* Comments of Tempo, *supra* note 130 at 7-8; *see also* Comments of United States Satellite Brdcstng. Co. to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 7 (April 6, 1998) [hereinafter *Comments of USSB*].

dictions of anticompetitive behavior are enough to justify crossownership restrictions.

1. *The Video Program Distribution Market is and will Continue to be Heavily Concentrated.*

The cable industry has the largest share of subscribers in the MVPD market.[150] The cable industry continues to be vertically integrated[151] with its programming networks.[152] Further, the cable industry continues to consolidate itself into regional "clusters"[153] of commonly owned cable systems in geographic areas.[154] The Commission expects this trend to continue.[155] It describes the local MVPD markets as "highly concentrated" and predicts that there may be a tendency for prices to rise above competitive levels and for product quality, innovation, and services to fall below competitive levels in both household and MDU (multiple dwelling unit) MVPD markets.[156] Cable prices continue to rise[157] and non-cable MVPD's have increased their number of subscribers but have not had a significant effect on cable subscribership.[158]

2. *Cable System Operators Have a History of Unfair Play.*

Cable interests have a record of anticompetitive conduct.[159] The cable system operators have used their leverage as creators and distributors of video programming to make market entry more difficult for competitors.

a. *Primestar is an Example of Past Anti-Competitive Behavior.*

Five of the largest cable system operators own sixty percent of Primestar,[160] a direct-to-home video satellite service that operates in the domestic satellite service[161] (DOMSAT) bands.[162] In 1992, Primestar and its cable system owners/partners were the subject of restraint of trade investigations and consent decrees.[163] The decrees expired October 1, 1997, and Primestar is free

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150 *See Notice of Proposed Rulemaking*, 13 FCC Rcd. 6907, n. 2. The Commission cites the most recent video competition report, which found that of the 73.6 million households in the MVPD market, that 64.2 million were cable subscribers, 7.2 million were satellite subscribers of some form (DBS, DTH-FSS and big-dish C-band), 1.1 million subscribed to MMDS (wireless cable) systems, 1.2 million to SMATV and 3,000 subscribed to an "open video system." *Id.* (citing *1997 Competition Report, supra* note 1 at Appendix E, Table E-1).

151 *See* DONALD RUTHERFORD, DICTIONARY OF ECONOMICS at 484 (1992). Vertical integration is "the joining together of two or more stages of production." *Id.*

152 *See 1997 Competition Report, supra* note 1 at para 159. Cable MSO's own 50% or more of 50 networks, 26 of the top 50 most viewed networks are vertically integrated, with 8 of the top 15 prime-time rated networks vertically integrated. *See id.* at paras. 159-60. New non-affiliated networks are being created, but the barriers to success as an independent network are high, with a high capital cost barrier and barriers to entry. *See id.* at para. 165.

153 *See 1997 Video Competition Report, supra* note 1 at para.140. Clustering is the consolidation of cable system ownership in a particular region. *Id.*

154 Now nearly 53 percent of the cable households in America are in these clusters, up from 50 percent the last year statistics were measured. *See id.* at para. 143.

155 *See id.* at para. 142.

156 *See id.* at para. 126.

157 *See NPRM, supra* note 11 at para. 1.

158 *1997 Competition Report, supra* note 1 at para. 128.

159 *See Echostar Comm. Corp v. Rainbow Media Holdings, Inc. and Rainbow Programming Holdings, Inc.*, FCC File No. CSR-5127-P (complaint filed Oct. 14, 1997); *and DirecTV v. Comcast Corp.*, FCC File No. CSR-5112-P, DA 98-2151, 1998 W.L. 747904 (complaint filed Sept. 23, 1997); *and In re* Echostar Comm. Corp v. Fox/Liberty Networks, *Program Access Complaint*, FCC File No. CSR-5138-P, DA 98-2153 (Released Oct. 28, 1998); *EchoStar Comm. Corp. v. Fox/Liberty Networks, LLC and fX Networks, LLC*, 13 FCC Rcd. 7394 (1998); *c.f. Wizard Program. Inc. v. Superstar/Netlink Group*, 12 FCC Rcd. 22102 (1997) (complaining price discrimination against vertically integrated cable-system owned program supplier); *and Corporate Media Partners v. Rainbow Programming Holdings, Inc.*, 12 FCC Rcd. 15209 (1997) (MVPD charging price discrimination against cable-owned program supplier); *and c.f. Classic Sports Network v. Cablevision Sys. Corp.*, File No. CSR-4975-P (rel. Dec. 24, 1997) (asserting that programmer-affiliated systems would only allow vertically-integrated programs on system).

160 *See* Leslie Cauley and John Lippman, "News Corp. and an Affiliate of TCI Set Tentative Accord to Control Primestar," WALL ST. J. (Sept. 8 1998) at B3 (chronicling the News Corp and TCI Satellite Entertainment's proposed buyout of Primestar). Primestar was originally formed as "K-Prime" entertainment. Primestar's service is transmitted in a manner similar to the current DBS systems, but with a satellite that uses less power. Time Warner, MediaOne Group, Cox Communications, Comcast and TCI Satellite Entertainment are among Primestar's biggest shareholders. Primestar is owned by G.E. Americom, Comcast, Continental Cablevision, Cox Communications, Tele-communications, Inc., Newhouse Broadcasting and Time-Warner.

161 See RICHARD WEINER, WEBSTER'S NEW WORLD DICTIONARY OF MEDIA AND COMMUNICATIONS (1996). The domestic satellite service transmits primarily for in-country use.

162 *See 1995 DBS Auction Order, supra* note 134 at para. 41; United States Satellite Broadcasting Co. Quarterly Report (Dec. 31, 1997). Primestar operates in the Fixed Satellite Service ("FSS") band with a medium-power satellite that requires larger 3-foot satellite dishes (contrast EchoStar, USSB and DirecTV use of 18-inch antennas). The programming is similar to that of EchoStar, USSB/DirecTV and cable. Like cable, but unlike DirecTV/USSB and EchoStar, Primestar leases its equipment to consumers. *Id.*

163 *See New York v. Primestar Partners, L.P.*, 1993-2 Trade

under the decree to become a high-power DBS operator, investor, or licensee after it gives 45 days notice to the states.[164]

While the *Primestar* decrees and program access complaints are not directly part of the record in the *NPRM*, the Commission maintains authority to take into account its experience of a cable operator's past actions when it makes decisions based on predicted conduct.

b. *Predictions of Economic Misbehavior Justify a Crossownership Prohibition.*

The Commission can institute a crossownership prohibition if it anticipates that anticompetitive behavior may occur. In upholding the LMDS/cable crossownership ban in *Melcher v. FCC*,[165] the court asserted that a complete and factual support in the record is required when the Commission establishes criteria based on predictions of market and regulated entities behavior.[166] However, when factual certainties do not exist or do not provide the answer, the Commission is only required to state and identify the considerations that it found persuasive.[167] In *Melcher*, the Commission's considerations were not limited to the formal record in the LMDS proceedings.[168] For example, the Commission relied on standard economic theory, its experience, analogous situations in the cable industry, and an assessment of competitive and regulatory developments in the local telephony and MVPD markets.[169]

From these criteria the Commission concluded that an LMDS license's value would be of its potential to preserve profits that a non-cable competitor would erode.[170] The *Melcher* court was influenced by the Commission's application of economic theory[171] when it found the Commission's predictions reasonable and with adequate support.[172]

Commenting on the *NPRM*, DirecTV notes that the Commission found in the *LMDS Order* that a cable LMDS licensee would have the incentive to protect its market power and DirecTV believes that the same motives exist in DBS.[173] This reasoning is sound because the economic arguments in LMDS should be even more applicable to DBS.[174] Concentration of ownership and the economic theories of competitive behavior[175] should be even more persuasive because a cable interest would be able to gain national coverage with the acquisition of a single license.

Cas. (CCH) P70,404 (1993); *and New York v. Primestar*, 1993-2 Trade Cas. (CCH) P70,403 (1993). The cases followed a five-year investigation and alleged that the cable system owner-partners and Primestar stifled competition from non-cable operators and attempted to suppress the development of DBS technology as a competitor to cable service. *See LMDS Order*, 12 FCC Rcd. 12545 at paras. 166-67, *see also* David J. Saylor, *Programming Access and Other Competition Regulations of the Television Law and the Primestar Decrees: A Guided Tour Through the Maze*, 12 CARDOZO ARTS & ENT. L.J. 321 (1994) (offering a summary and analysis of the Primestar decrees).

164 *See id.* at 369-70.

165 *See Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998) (upholding LMDS/Cable cross-ownership prohibition).

166 *See id.* at 1156.

167 *See id.*

168 *See id.* at 1155-57.

169 *See id.* (quoting the *LMDS Order, supra* note 44 at para. 179).

170 *See Melcher v. FCC*, 134 F.3d at 1157.

171 *See LMDS Order, supra* note 46 at para. 174, n. 267 (citing multiple sources on preemption).

172 *See id.*

173 Comments of DirecTV, Inc. to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 3-4 (Apr. 6, 1998) [hereinafter *Comments of DirecTV*]; *and* Comments of Tempo Satellite, *supra* note 130 at 7 (Apr. 6, 1998) (Citing the *LMDS Order, supra* note 46 at para. 171).

174 Time Warner Cable refutes this by pointing out that "the Commission envisions the cable/LMDS cross-ownership band as a short-term, three year restriction intended to protect LMDS during its infancy." Reply Comments of Time Warner, *supra* note 63 at 8. While this may be a correct characterization of the application and purpose of the rule, it does not address the issue at hand: whether the Commission could promulgate a cross-ownership prohibition on the basis of economic predictions of possible anti-competitive behavior.

175 *See generally* DOUGLASS NEEDHAM, THE ECONOMICS OF INDUSTRIAL STRUCTURE, CONDUCT AND PERFORMANCE at 159-183 (1978). Economists studying the dynamics of business competition and business behavior have developed pertinent mathematical and theoretical models. These models include an analysis of the existence of barriers to market entry and attempt to predict the effect on potential market entrants. *See id.* at 1-25; INGEMAR DIERCKX AND KAREN COOL, *Competitive Strategy, Asset Accumulation and Firm Performance*, STRATEGIC GROUPS, STRATEGIC MOVES AND PERFORMANCE at 63-79 (Herman Daems and Howard Thomas, ed. 1994). The economist can model and predict the likely conduct and performance of a particular company and the particular strategies it might choose. *See generally* Tracy R. Lewis, *Preemption, Divestiture, and Forward Contracting in a Market Dominated by a Single Firm*, 73 AM. ECON. REV. 1092-1101 (Dec. 1983); Marvin B. Leiberman, *Excess Capacity as a Barrier to Entry: An Empirical Appraisal*, 35 JOUR. INDUS. ECON. 607-627 (June 1987). The theory of preemption posits that a heavily concentrated market will continue to stay heavily concentrated because the advantages of incumbency grow over time and form a strong barrier to market entry by a competitor.

II. ANTITRUST ANALYSIS AS A PUBLIC INTEREST SAFEGUARD

Having stated that the Commission has the authority to affect a blanket crossownership prohibition, it is unlikely that the Commission would decide to maintain the status quo.[176] The decision to address competition concerns *ad hoc* would arguably be against the public interest unless the argument stands that the service is still developing.[177]

The general consensus of the commentators[178] is best summarized by DirecTV which stated that "a *per se* cable/DBS crossownership ban is a harsh measure inconsistent with the flexibility that has characterized DBS service regulation."[179] DirecTV's position is that as the MVPD market becomes more competitive, cable-DBS affiliations will not pose the competition concerns that exist now.[180]

A. Precedent and Advantages of a Case-by-case Analysis

DirecTV's statement that cable participation in DBS may be welcome at some point in the future is logical. First, when the Commission conditionally authorized cable operator TCI's affiliate Tempo Satellite in the *Tempo II* decision,[181] it stated that MVPD experience and resources would be helpful in the initiation and launch of the first DBS services. Secondly, the Commission has stated that it prefers addressing DBS competition on a case-by-case basis with a reliance on existing antitrust law, although it has never precluded a blanket ownership prohibition.[182]

1. *TEMPO II*

The Commission in *Tempo II* approved a conditioned operation authorization for TCI-controlled Tempo Satellite.[183] In that proceeding, the Commission stated that existing antitrust law, in combination with the conditions it imposed in the Order would be adequate to prevent any anti-competitive conduct by Tempo.[184] The Commission also stated that in 1990 it recommended that Congress reaffirm the applicability of traditional antitrust principals to DBS and the obligation of firms to avoid interference with emerging competition.[185]

2. *1995 DBS Auction Order*

In its *1995 DBS Auction Order*, the Commission disagreed that the public interest is furthered by freezing the structure of the DBS industry with a blanket crossownership prohibition.[186] It believed that the adopted *Order* would leave it free to evaluate future transactions on a case-by-case basis.[187] In addition, the Commission noted that it would continue to have rulemaking authority to remedy anti-competitive conduct and consider additional rules, if required.[188] The FCC also noted that the presence of DirecTV, EchoStar, and USSB would constrain a cable/DBS combination because consumers could still choose two other competitive DBS sources.[189] In a nod to *Tempo II*, the Commission recognized that cable-affiliated MVPDs bring certain positive attributes as DBS permittees.[190]

The Commission's expressed preference of a case-by-case approach to DBS crossownership is

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176 Many of the commentators in the proceeding have stated that some form of action is needed. DirecTV states that Congress specifically called upon the Commission to exercise its existing authority to adopt ownership limitations should it be determined they would serve the public interest. Comments of DirecTV, *supra* note 173 at 9.

177 Query, however, that it would ever be likely for a decision to continue with an informal analysis to be overturned upon judicial review. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). The Supreme Court in *Vermont Yankee* has expressly tied the judiciary from imposing any new procedural requirements on an administrative body.

178 *See* Comments of BellSouth Corp., BellSouth Interactive Media Serv., Inc. and BellSouth Wireless Cable, Inc. to *In re* Policies and Rules for the Direct Broadcasting Service, FCC 98-26 at 3 (April 6, 1998); Comments of DirecTV, *supra* note 173 at 11; Comments of the Office of Communication, United Church of Christ and Consumer's Union to *In re* Policies and Rules for the Direct Broadcasting Service, FCC 98-26 at 3 (April 6, 1998) [hereinafter *Comments of UCC*].

179 *See* Comments of DirecTV, *supra* note 173 at 3-4.

180 *Id.* at 11. *See also* Reply Comments of United States Satellite Brdcstng. Co., Inc. to *In re* Policies and Rules for the Direct Broadcasting Service, FCC 98-26 at 2 (April 21, 1998) [hereinafter *Reply Comments of USSB*].

181 *See In re* Application of Tempo Satellite, Inc. for Construction Permit for New Direct Broadcast Satellite System, 7 FCC Rcd. 2728 (1992) [hereinafter *Tempo II*].

182 *See id.* at para. 3.

183 *See id.* at para. 1

184 *See id.*

185 *Id.* (citing the *1990 Cable Report*, 5 FCC Rcd. 4962, 5031 (1990).

186 *See 1995 Auction Order* at para. 31.

187 *See id.*

188 *Id.*; *See also id.* at para. 76.

189 *See 1995 DBS Auction Order, supra* note 134 at para. 73.

190 *See id.* at para. 73-74. Query whether these positive attributes come mostly from the heavy vertical integration of the cable and programming industries.

not enough to continue an ad hoc policy. An administrative law case-by-case approach suffers from the same vagaries of the common law — it is inherently unpredictable and inconsistent.[191] A case-by-case approach also subjects each proceeding to the possibility that any particular transaction's concept of the public interest will vary according to the political tide.[192]

B. Adopting a Formal Antitrust Analysis

In the 1990's, the Commission began to adopt a competitive analysis framework based on the Federal Trade Commission and Department of Justice's 1992 Horizontal Merger Guidelines.[193] The Commission primarily used this analysis in common carrier contexts.[194] However, the International Bureau[195] has since adopted the analysis in the context of satellite regulation in the 1998 *Ardis Order.*[196]

The analysis compares the before and after effects of the transaction on competition.[197] The Commission takes considers any beneficial efficiencies of the transaction along with any other public interest benefits that are likely to result.[198] It relies heavily on the *1992 Horizontal Merger Guidelines* while incorporating the Commission's independent expertise.[199] The Commission's analysis departs from that of the Department of Justice in that in incorporates decades of Commission experience in telecommunications market competition.[200]

The analysis first begins with the definition of the relevant markets, both geographic[201] and product.[202] Second, current and potential participants are identified in these markets[203] and, third, the effects that the transaction may have on the relevant markets are evaluated.[204] Fourth, the analysis considers whether the transaction will have any harmful or beneficial effects, by weigh-

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191 *See Commissioner v. Duberstein*, 363 U.S. 278, 290 (1960) (stating in dicta that a case by case approach may not satisfy an academic's desire for neatness).

192 Several commentators note that Commissioners Powell and Furtchgott-Roth assert a reliance on the Department of Justice's antitrust enforcement powers. *See* Comments of NCTA, *supra* note 136 at 4; *see also* Comments of Time Warner Cable, *supra* note 80 at 9; *See also In re* Policies and Rules for the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, Separate Statement of Commissioner Harold W. Furtchgott-Roth Dissenting, 13 FCC Rcd. 6907 (rel. Feb. 26, 1998); *and In re* Policies and Rules for the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, Separate Statement of Commissioner Michael K. Powell Approving in Part, Dissenting in Part, 13 FCC Rcd. 6907 (rel. Feb. 26, 1998). This would be an abdication of the Commission's duty to regulate in the public interest. In *Applications of Telecommunications, Inc. and Liberty Media* the Commission rejected a reliance on the Commission's cable program carriage regulations to protect consumers from anti-competitive behavior. It felt that the reliance on a series of case by case decisions would prevent the Commission from getting a "clear picture" of the market structure and the public interest as a whole. *See In re* Telecommunications, Inc. and Liberty Media Corp., *Applications for Transfer of Control of Radio Licenses*, 9 FCC Rcd. 4783 at para. 21 (1994) (stating that it is "well settled" that the public interest means the public as a whole). That would be the case here also, because a reliance on the Department of Justice to address competition issues would prevent the Commission from getting the whole picture, let alone a quick glimpse of the statue of the marketplace.

193 *See In re* Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985 at para. 37 (1997) (hereinafter *Bell Atlantic/NYNEX Order*); *and Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines*, 4 Trade Reg. Rep (CCH) ¶ 13,104 (1992), 57 FR 41, 552 (Sept. 10, 1992), 1992 FTC LEXIS 176 (1992) (hereinafter *1992 Merger Guidelines*).

194 *See LMDS Order, supra* note 46 at para. 37, n. 88. While the Commission has used the analysis primarily in a common carrier (telephone and long distance carrier) context, however, it was also used in the *LMDS Order.*

195 One of 5 divisions of the FCC, responsible for all satellite services and international telecommunications regulation.

196 *See In re* Application of Motorola, Inc. and American Mobile Satellite Corp. for Consent to Transfer Control of Ardis Co., 13 FCC Rcd. 5182 (1998) [hereinafter *Ardis Order*]. In this proceeding commentators Ameritech urged the Commission to adopt this analysis. Comments of Ameritech to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 5-14 (April 6, 1998).

197 *See Ardis Order, supra* note 196 at para. 9

198 *See id.* In the *1992 Merger Guidelines*, the Department of Justice and the Federal Trade Commission stated that the Agency seeks to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral while challenging competitively harmful mergers. *See 1992 Merger Guidelines, supra* note 191 at § 0.1.

199 While the analysis is heavily based on the *1992 Merger Guidelines*, the Commission's function is to enforce the standard of the public, interest, convenience and necessity and has the duty to refuse licenses or renewals to those that will engage in or propose to engage in actions that will prevent the full use of the licensed facilities. *See In re* Telecommunications, Inc. and Liberty Media Corp., *Applications for Consent to Transfer Control of Radio Licenses*, 9 FCC Rcd. 4783 at para. 18 (1994) (stating that it is not the function of the FCC to enforce the antitrust laws "as such").

200 *See Ardis Order, supra* note 196 at para. 10.

201 *See id.* at para. 11; *and 1992 Merger Guidelines, supra* note 193 at § 1.2.

202 *See Ardis Order, supra* note 196 at para. 11; *and 1992 Merger Guidelines, supra* note 193 at § 1.1.

203 *See Ardis Order, supra* note 196 at para. 12; *and 1992 Merger Guidelines, supra* note 193 at §§ 1.3-1.5.

204 *See Ardis Order, supra* note 196 at para. 14; *and 1992 Merger Guidelines, supra* note 193 at §§ 2.0-2.2.

ing these effects to determine whether the overall effect is to enhance competition.[205]

Applying this analysis in the *Bell Atlantic/NYNEX Order*,[206] the Commission has stated that applicants carry the burden of showing that the proposed merger would not eliminate potentially significant sources of competition that the Communications Act of 1934, as amended, sought to create.[207] Thus, a party must prove that the transaction will enhance and promote competition, rather than prove the competition will not be eliminated or retarded.[208]

1. *Relevant Geographic and Product Markets*

In the case of DBS, the matters of geographic and product markets[209] have been well settled. The *1995 Auction Order*, the *1997 Competition Report*, the *Notice of Proposed Rulemaking* and the parties' comments and reply comments are in agreement.[210] The relevant product markets is the MVPD market and the relevant geographic market is the nation as a whole.[211]

2. *Competition Under the Analysis: Actual and Potential*

A discussion of the current and potential competitors is less straightforward than a discussion of the relevant market shares. Broadly defining the entire MVPD market includes all of the actual existing participants in the market. The analysis also requires for the consideration of any potential competitors. Traditional antitrust theory uses the concept of actual potential competitors to examine the potential effects of the transaction.[212]

The *1992 Merger Guidelines* use a quantitative analysis under the potential competition doctrine.[213] In the *Bell Atlantic/NYNEX Order*, the Commission accepted the doctrine as a tool of general application but warned that it will not bound by it when it uses its own analysis developed through years of experience with telecommunications competition policy.[214] The Commission rejected the application of the actual potential competitor doctrine as it is applied, to its public interest analysis.[215]

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205 *See Ardis Order, supra* note 196 at para. 16; *see also, 1992 Merger Guidelines, supra* note 193 at §§ 2.0-2.2 & 4; *and Revision to the Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission*, 1997 FTC LEXIS 283 (April 8, 1998) at § 4 (hereinafter *1997 Guideline Revision*).

206 *See Bell Atlantic/Nynex Order, supra* note 193.

207 *See id.*

208 *See Bell Atlantic/NYNEX Order, supra* note 193 at para. 3. The Commission concludes that both Bell Atlantic and NYNEX were potential competitors, and was prepared to decline the application for merger. However, the parties agreed to voluntary undertake "a series of commitments" that would condition the approval of the merger. *Id.* at paras. 7-12.

209 The *1992 Merger Guidelines* note that a merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market. Mergers that neither significantly increase concentration nor result in a concentrated market ordinarily require no further analysis. *1992 Merger Guidelines, supra* note 193 at § 1.0.

210 *See* Comments of Ameritech to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 8 (April 6, 1998); *and* Comments of DirecTV, *supra* note 173 at 6-7; Comments of EchoStar Communications Corp. to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 6 (April 6, 1998) [hereinafter *Comments of EchoStar*]; Comments of the NCTA, *supra* note 136 at 9; *but c.f.* Comments of the Wireless Cable Association to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 5 (April 6, 1998).

211 Query whether this definition includes the non-contiguous Unites States. In this same proceeding, one of the other contested proposals was to strengthen requirements that DBS operators serve Alaska and Hawaii. Both states comment that they do not receive the DBS service and are not likely to in the future. *See* Comments of the State of Alaska to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 (April 6, 1998); *and* Comments of the State of Hawaii to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 (April 6, 1998) This is due to technical constraints. The orbital position of the satellite dictates how much of the country can be "viewed" by the satellite. After a distance, the curvature of the earth causes some places to be below the horizon of the satellite. In the case of Alaska and Hawaii, their distance from the mainland places those states past the horizon of the CONUS orbital positions. *See id.*; *and* 47 C.F.R. § 100.53 (1998).

212 *See Bell Atlantic/NYNEX Order, supra* note 193 at 138.

213 *See 1992 Merger Guidelines, supra* note 193 at § 1.5. The doctrine asks five questions. First, whether the market is highly concentrated. *See* 5 PHILLIP AREEDA AND DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPALS AND THEIR APPLICATION ¶ 1119 (1980 & Supp. 1997) [hereinafter *Antitrust Law*]. Second, the doctrine analyzes whether the few other potential entrants are equivalent to the company that proposes to enter the market by merger. Third, the doctrine asks whether "but for" the merger the company would have been reasonably likely to enter the market in absence of the merger. Fourth, the analysis asks whether the merging company would have had another feasible means of entry. *See 1992 Merger Guidelines, supra* note 193 at § 3; *and Antitrust Law, supra* at ¶ 1124. Finally the analysis considers whether the other alternative means of entry would have had a substantial likelihood of producing market deconcentration or other pro-competitive effects. *See Bell Atlantic/NYNEX Order, supra* note 193 at para. 138

214 *See id.* at para. 136.

215 *See Bell Atlantic/NYNEX Order, supra* note 193 at para. 139 (stating that because the Commission is determining whether *Bell Atlantic* has carried the burden of demonstrating that the merger is in the public interest as opposed to violat-

3. Potential Benefits and Harms of a Transaction.

The Commission's analysis of the potential harms of the transaction also includes an analysis of the potential benefits.[216] According to the *1992 Merger Guidelines,* an agency should consider only efficiencies that would unlikely occur absent the transaction.[217] These efficiencies must also be weighed against the potential harms and the benefits to the public interest must increase as the harms to the public become greater and more certain.[218]

The benefits of cable ownership of DBS are not clear. There is no evidence that reduced prices will devolve to the consumer. It is quite possible that a cable interest would use leverage derived from market concentration and a DBS license to achieve an advantage against the existing competitors. Cable rates after deregulation have risen and there is no reason to believe that they will decrease after cable entry into DBS.

It is also unlikely that a cable-affiliated licensee would bring competitive benefits that another market entrant could not. Although faced in the *1995 DBS Action Order* with ambiguous evidence of the effects of cable participation, the Commission rejected the imposition of cable/DBS restriction.[219] Under this analysis, a cable applicant's DBS license would be denied unless it could demonstrate concrete pro-competitive results.

C. Advantages of the *Bell Atlantic/Nynex* Analysis.

1. The Analysis is not Over or Under-Inclusive.

The analysis has many advantages. First it is not over-inclusive. It weeds out the potentially harmful transactions while permitting the beneficial transactions.[220] Financing available to the DBS industry would only be limited by excluding transactions that would most likely result in anti-competitive behavior.[221] Transactions involving a cable interest with a minor national market share would still move forward and allow DBS access to greater financial resources and provide a cable entity the opportunity to compete against larger MVPD entities.

The use of this heightened transaction analysis also avoids the potential of future under-inclusiveness. While cable interests will maintain an overwhelming percentage of the MVPD market into the foreseeable future,[222] it would be a futile exercise to predict that future technological developments will not eliminate or significantly reduce cable's dominance. If cable is replaced by a new dominant technology, it is not impossible to imagine that the new technological giant would pose the problems and raise the same issues that cable participation in DBS currently presents.

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ing the antitrust laws, it will not address whether the record establishes a violation of Section 7 of the Clayton Act and so it does not need to conduct an analysis under the doctrine). James R. Weiss and Martin L. Stern described the Commissions approach to antitrust analysis in the *Bell Atlantic/NYNEX Order* as lip service. *See Serving Two Masters, supra* note 120 at 203.

216 *See Ardis Order, supra* note 194 at para. 68; *and Bell Atlantic/NYNEX Order, supra* note 193 at 157. This includes the efficiencies that would result from the merger. The *1992 Merger Guidelines* state that the primary benefit of mergers to the economy is their potential to enhance efficiency, increase the competitiveness of firms and result in lower prices to consumers. *1992 Merger Guidelines, supra* note 193 at § 4. In the *Bell Atlantic/NYNEX Order* the Commission stated that "efficiencies almost never justify a merger to monopoly or near monopoly." *Bell Atlantic/NYNEX Order, supra* note 193 at para. 159.

217 *See 1997 Guideline Revision, supra* note 205 at § 4.

218 *See Bell Atlantic/NYNEX Order,* supra note 193 at para. 157.

219 *See 1995 Auction Order, supra* note 134 at paras. 27 & 75.

220 The nature of the Commission's application of this analysis in balancing the current and future benefits of a particular transaction allows marginally beneficial transactions to move forward, as long as the Commission foresees market and technological change. *See Serving Two Masters, supra* note 20 at 207-208 (commenting on the *Bell Atlantic/NYNEX Order's* application of this analysis in approving the *Bell Atlantic/Nynex* merger).

221 *See* Comments of News Corp., *supra* note 117 at 8-10; *and* Comments of PanAmSat to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 6 (Apr. 6, 1998).

222 This is for the myriad of reasons that cable and DBS/direct-to-home satellite differ: antenna size and "view" restrictions, atmospheric conditions, the existing installed base, lack of local channels and the initial expense of equipment and installation.

2. The Least Intrusive Option

This analysis also is the least intrusive of the options available to the Commission.[223] It does not disturb the current ownership relationships or pose an absolute barrier to market entry at a future date. The *Primestar* applications are still pending before the Commission. Under this analysis they would likely not be granted. However, it would not call for the divestiture of Tempo's authorization because the competitive concerns in that proceeding were addressed and remedied by the imposition of conditions on the grant of authorization.[224]

3. Preserves the Ability of the DBS Industry to Adapt to Change

This formal analysis preserves both the industry's ability to respond to change and the Commission's ability to review future transactions on a case-by-case basis.[225] The development of DBS has demonstrated that the industry has benefited from regulatory flexibility.[226] Regulatory flexibility allowed DBS operators to develop and implement preferential technical specifications. DBS service evolved into a strong competitor to cable because if the operators had been bound by FCC standards promulgated at the service's inception, DBS would have been forced into system designs with less channel capacity based on 1980's technology.[227] While concrete benefits of MVPD participation in DBS are far from certain, such prescience was not required during the inception of DBS.

4. Less Serious DBS Competitive Concerns Can Be Addressed Through Conditional Licensing

If the competitive concerns raised in a particular case are not serious enough to warrant the denial of a license under the analysis, the Commission can make a conditional grant as it did in *Bell Atlantic/NYNEX* and *TEMPO II*.[228] The public interest would be assured not only by the use of the analysis, but also by conditional licensing. The availability of two regulatory tools assures that a party seeking a DBS license transfer or authorization will be bound to a specific agreement to serve the public interest.

5. The Analysis Adds Predictability and Consistency

The Commission acknowledged in its *NPRM* that predictability and consistency in DBS owner-

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223 *See 1995 Auction Order, supra* note 134 at para. 65. The Commission states that "[w]e share many commenter's [sic] reluctance for regulation of the DBS service, which is why we have sought to implement the least intrusive means possible to further the goals articulated above of fostering competitive rivalry among MVPD's." *Id.* This is not to say that there are not costs involved. A party to a particular transaction must incur costs to apply for Commission approval, respond to public comments and undergo significant document production. *See Serving Two Masters, supra* note 20 at 206.

224 *See Tempo II, supra* note 181 at para. 12. The situation in the *Primestar* applications poses more serious concerns than that in *Tempo II*. Where Tempo's major MVPD shareholder was TCI Satellite Entertainment ("TCI-SAT"), Primestar is held collectively by five of the major cable system operators. Any anti- competitive conduct by Tempo would involve only one of the major cable system operators, where the conduct of Primestar would involve a collective of the five biggest operators who aggregately control over 50 percent of the cable market.

225 *See id.* Commissioners Furtchgott-Roth and Powell in their partial dissents to the *NPRM* expressed concerns that a blanket prohibition would sacrifice the flexibility that characterized DBS in the past, and would completely ignore a less regulatory approach. *See In re* Policies and Rules for the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, Separate Statement of Commissioner Harold W. Furtchgott-Roth Dissenting, 13 FCC Rcd. 6907 (1998); *and In re* Policies and Rules for the Direct Broadcast Satellite Service, *Notice of Proposed Rulemaking*, Separate Statement of Commissioner Michael K. Powell Approving in Part, Dissenting in Part, 13 FCC Rcd. 6907 (1998) (stating that competitive concerns exist and should be addressed in a separate proceeding).

In testimony to Congress following Commission approval of the *Bell Atlantic/NYNEX* merger, then-Chairman Reed Hundt said that the application of this analysis to that transaction was a landmark decision in describing a detailed flexible public interest analysis. *See Serving Two Masters, supra* note 20 at 203 (citing *The Telecommunications Act: An Antitrust Perspective: Testimony of Reed Hundt, Chairman, FCC, Testimony Before the Senate Judiciary Comm., Subcomm. on Antitrust, Business Rights and Competition*, Sept. 17, 1997, available in LEXIS, Legis Library, Cngtst file).

226 *See* Comments of Tempo Satellite, *supra* note 130 at 3; *and* Comments of Primestar, *supra* note 117 at 20; *and* Comments of DirecTV, *supra* note 173 at 27; *c.f. EchoStar Quarterly Report* (stating that the FCC has typically shown flexibility when satellite failures occur).

227 *See* Reply Comments of Primestar to *In re* Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 11-12 (April 21, 1998); Reply Comments of EchoStar, *supra* note 63 at 11-12.

228 The Commission also imposed conditions when MCI applied for Commission of its proposed merger with British Telecom, a transaction that was not consummated for other reasons. *See Serving Two Masters, supra* note 19 at 204 (citing *In re* The Merger of MCI Comm. Corp. and British Telecomms. PLC, 12 FCC Rcd. 3460 (1997); Proposed Final Judgement and Memorandum in Support of Modification, 2 Fed. Reg. 37594 (1997)).

ship qualifications offers some desirability.[229] The Commission has been criticized for inconsistent application of economic principles and analysis.[230] Critics have targeted the Commissions unwillingness to use a principled analysis in some situations where policy would not be furthered by its application.[231] This analysis rejects some of the doctrines present in the Department of Justice's *Merger Guidelines*[232] but it does offer the affected parties a more concrete guide in predicting how the Commission may rule in any particular proceeding.

III. CONCLUSION

The Commission should adopt a formal antitrust analysis when it approaches DBS crossownership issues. A published, structured analysis offers participants and the public a concrete guideline that creates more predictable results than a pure *ad hoc* approach. Unlike a blanket rule prohibiting cable ownership of DBS, it offers the industry continued flexibility in financing and the ability to form strategic relationships offsetting the costs of implementing a DBS system. At the same time, it preserves the public's interest in affordable, competitive multi-channel video programming. It is an effective compromise, and a logical extension of Commission policy and the deregulatory spirit of the Telecommunications Act of 1996 that will reach into the homes of every American consumer. As Commission Chairman Hundt described the *Bell Atlantic/NYNEX Order*, this analysis offers the still-evolving DBS service a "flexible and dynamic approach to industry structure."[233]

229 *See NPRM, supra* note 11 at para. 58.

230 *See generally,* Warren G. Lavey, *Inconsistencies in Applications of Economics at the Federal Communications Commission,* 45 FED. COM. L.J. 437 (Aug. 1993).

231 *See id.* at 460-88.

232 *See 1992 Merger Guidelines, supra* note 193.

233 *See Serving Two Masters, supra* note 20 at 203.